Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JUNE TERM, 1996

HERBERT LIU

Petitioner,

v.

NEW YORK CITY POLICE DEPARTMENT, LEONARD KAPLAN and ROBERT PLUTZKER,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR CERTIORARI

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35pp

QUESTION PRESENTED

1. Whether the conclusion of the courts of the State of New York, including the Court of Appeals of the State of New York, which determined that, with respect to Petitioner's federal claims, the individual respondents were shielded by the doctrine of qualified immunity, was inconsistent with applicable decisions of this Court?

LIST OF ALL PARTIES

Herbert Liu, Petitioner

New York City Police Department, Respondent

Leonard Kaplan, Respondent

Robert Plutzker - Respondent

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OPINIONS BELOW

The only opinion below, to Petitioner's knowledge, which has thus far been reported, is the opinion of the Appellate Division of the Supreme Court of the State of New York at 627 N.Y.S.2d 683 (1st Dept. 1995).

JURISDICTION

1. The final decree rendered by the State of New York Court of Appeals, the highest court of the State of New York in which a decision could be had, was entered on November 30, 1995.

2. There is no order respecting a re-hearing.

3. This Court has jurisdiction to review the judgment or decree in question by writ of certiorari pursuant to 28 U.S.C. Section 1257 and Rule 10 of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

The relevant statutes are as follows:

Amendment XIV to U.S. Constitution - Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property with due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Section 1983

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. Background

Petitioner maintains residences in both the States of New York and New Jersey, with his principal domicile in the State of New York at 10 Confucius Plaza, New York, New York.

At all times hereinafter mentioned, Petitioner was the holder of two (2) valid pistol licenses issued by Petitioner, to wit: carry license number C327780, expiration date April 21, 1991 and target license number T009918, expiration date April 21, 1991.

By said licenses, Petitioner was authorized to possess the following weapons: COLT .38 cal. serial number M717753; BAUER .25 cal. serial number 073352S; and COLT .45 cal. serial number CLW031933.

In 1987, Petitioner established a residence in West Orange, New Jersey; to wit: 454 Villas at Eagle Ridge #62. At the time that he established this residence in West Orange, New Jersey, Petitioner inquired of the West Orange Police Department as to the procedure to ensure that the firearms could be lawfully carried in transit from New York to New Jersey. Petitioner was advised that all that had to be done was to file a certain form to register the firearms in the State of New Jersey.

Pursuant to these instructions, Petitioner in a letter dated May 14, 1987, with attachments, communicated with the New Jersey State Police. Attached to this letter was a completed Form SP650 entitled Voluntary Form of Register of Firearms. In completing this form

Petitioner sought to register the COLT .38 cal. revolver serial number M717753. In the May 14, 1987 letter, Petitioner asked the New Jersey State Police if anything more was required to carry the licensed firearms from New York to New Jersey.

Petitioner mailed this letter with attachment certified mail return receipt requested. Petitioner also sent a copy thereof to the West Orange Police Department by certified mail return receipt requested.

Although the law enforcement agencies clearly received Petitioner's registration form together with the cover letter, neither agency responded to Petitioner's inquiry nor did they ever indicate that anything more was required. Petitioner therefore quite naturally relied upon his belief that the COLT .38 cal. revolver had been validly registered and that nothing more was required.

Petitioner's intent to do everything which was appropriate is also verified by his subsequent actions. Indeed, Petitioner acted to supplement the original registration information given to the New Jersey State Police. For example, on May 10, 1989, Petitioner completed yet another Voluntary Form of Register of Firearms. At that time, Petitioner completed the necessary papers to register the .25 cal. BAUER with the New Jersey authorities.

As with the original application, Petitioner forwarded this form by certified mail return receipt requested. A copy of the receipt for the certified mail, evidencing receipt by the New Jersey State Police was received by Petitioner. There can be no doubt therefore that the New Jersey State Police also received this document. Petitioner was not surprised therefore when the New Jersey State Police also failed to contact him after it had received this supplemental document in 1989. Again, Petitioner quite properly assumed that he had done all that was required and that nothing more had to be done to register the weapons and to transport them into the State of New Jersey. Thus, subsequent to these registration submissions, Petitioner believed that he was authorized to transport the designated weapons into the State of New Jersey.

At this time, it should be noted, Petitioner was an officer of United-Four Travel and Tours Ent. Co., Inc. d/b/a Wing On Travel, located at 221 Canal Street, New York, New York. In conjunction with his travel business, Petitioner regularly escorted bus tours to Atlantic City, New Jersey. Petitioner conducted one such tour during November 21-25, 1990, during which he escorted approximately two thousand (2000) individuals to the Sands Hotel and Casino in Atlantic City, New Jersey.

On this occasion, Petitioner acted as he always had when transporting registered weapons into the State of New Jersey. He secured the weapon in the trunk of his vehicle, with bullets removed. At the time of arrival in Atlantic City, Petitioner also acted as he had always been advised. He was always advised that when in Atlantic City, he had to secure his weapon in a safe deposit box, upon arrival at a hotel. Petitioner always complied.

Thus, acting as he always had, upon his arrival at the Sands Hotel and Casino on November 21, 1990 to November 25, 1990, Petitioner secured the aforesaid COLT .38 cal., which he believed had been previously registered in the State of New Jersey on or about May 14, 1987. At this time, Petitioner removed the weapon from the locked trunk of his vehicle and placed it in a safe deposit box, as he has always did in the past.

Petitioner, after he did so, was questioned by Police Officers employed by the Division of Gaming Enforcement of the New Jersey State Police. Petitioner, believing that the aforesaid weapon was properly registered, freely informed the Police Officers of its presence in the safe deposit box. Pursuant to the Police Officers request, Petitioner also freely consented to a search of the safe deposit box as well as his hotel room. As a result of the search, the Police Officers confiscated the aforesaid COLT .38 cal. from the safe deposit box. A voluntary search of Petitioner's hotel room uncovered six .38 cal. hollow point bullets which were also confiscated.

Petitioner then returned to New York. On December 24, 1990, Petitioner was contacted by a Police Officer Reynolds of the New York City Police Department. Police Officer Reynolds requested that Petitioner turn over his remaining licensed weapons for "safe-keeping". Police Officer Reynolds further advised Petitioner that he was acting upon the request of the New Jersey State Police. Petitioner was not given any further information.

Petitioner complied and on December 24, 1990, turned over one BAUER .25 cal. serial number 073352 and one COLT .45 cal. serial number CLW031933 to Police Officer Jeffrey Granowski, at the Fifth Precinct.

In an effort to learn the status of his duly licensed weapons and to determine why the duly licensed weapons were confiscated in the first place, Petitioner caused a letter dated December 28, 1990 to be sent to Petitioner. This letter noted:

> "It is my understanding that [petitioner] has not done anything which would jeopardize the existence of his pistol permit. As a result, I would request that you inform the undersigned as to why [petitioner] was requested to voucher his handguns. I would also like to be advised of when the guns will be returned to [petitioner]."

Petitioner never received any response thereto.

Still not having received any response concerning the status of this matter and not having been provided with any administrative remedies, Petitioner caused a proceeding to be commenced pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York on or about January 30, 1991.

B. Prior Proceedings

In that State Court proceeding, Petitioner sought a judgment compelling Respondents to return to him the licensed firearms which it had confiscated.

On or about March 8, 1991 and only after he had commenced the State Court proceeding, Petitioner received a letter from Respondents dated December 14, 1990. The envelope in which the letter was contained is postmarked March 7, 1991. The December 14, 1990 letter advised Petitioner for the first time, that his license was suspended and that he was entitled to a hearing. In support of this notice, the New York City Police Department cited Petitioner's alleged "failure to safeguard firearm(s)" and "other: unauthorized to transport".

It should also be noted that at sometime prior thereto Petitioner was charged, in the State of New Jersey, with Unlawful Possession of a Prohibited Device in the Fourth Degree to wit: the six hollow point bullets. It must be emphasized that this is considered a low degree criminal offense in the State of New Jersey and that possession of hollow point bullets is not prohibited in the State of New York. On or about September 17, 1991, Petitioner was ultimately acquitted of this charge after trial in New Jersey.

With this background in mind, in an Order dated March 25, 1991, the Honorable Stephen G. Crane, a Justice of the Supreme Court of the State of New York, dismissed the petition:

> "without prejudice and without costs, on the ground that petitioner must now pursue his administrative remedies and first exhaust them before returning to Court for review of any final administrative determination adverse to him".

Justice Crane's Order also directed Respondent:

> "to afford a hearing to petitioner within 10 days of service upon it of a copy of the judgment with notice of entry and thereafter to proceed to a prompt determination of the status of petitioner's licenses".

Pursuant to the lower court's directive, an Administrative Hearing was held before Respondent Robert Plutzker, Hearing Officer, on April 5, 1991.

In a determination dated April 11, 1991, Respondent Plutzker ruled that Petitioner's pistol licenses have been revoked due to "Circumstances of arrest(s)/incident(s) cast grave doubt upon licensee's character and fitness to possess a pistol license." He also found that Petitioner's attempts to register the gun in the State of New Jersey were "minimal".

As a result, Petitioner duly appealed Respondent Plutzker's determination to the Commanding Officer of the Petitioner's Licensing Division in a letter dated April 22, 1991.

In a final administrative determination dated May 7, 1991, Respondent Leonard Kaplan, Deputy Inspector, Commanding Officer, License Division; affirmed the revocation of Petitioner's pistol target license and pistol carry license.

> In support thereof, Respondent Kaplan held:
>
> a) Establishment of residence in the State of New Jersey in 1987. Said residence listed as 454 Villas at Eagle Ridge #62, West Orange New Jersey. Licensee failed to notify the License Division of a change of residence address as required by Pistol License Regulations.
>
> b) Seizure on November 25, 1990 of handgun not licensed in the State of New Jersey. Said seizure was

made by the New Jersey State Police in Atlantic City, New Jersey.

c) Licensee's Criminal Indictment #91-02-0436C by the superior Court of New Jersey for Unlawful Possession of a Prohibited Devise.

C. The Within Action

On or about June 18, 1993, Petitioner commenced the within action by service of a Summons and Verified Complaint.

(R-37) In this action Petitioner contended that his Pistol License was revoked unlawfully and in bad faith in that it was discriminatorily based entirely upon his Chinese national origin and upon an arrest for which he was acquitted and was, therefore, motivated by no proper public purpose.

More specifically, Petitioner submitted that Respondents undertook the complained of actions because Petitioner, as the result of his national origin, had been falsely accused in both the media and by law enforcement agencies as having connections to Chinese organized crime. The State Court record contained a series of documents and publications attesting to Petitioner's notoriety.

In fact, Petitioner, in support of his assertion, cited, in his complaint, the fact that Respondents, in or about 1985, suspended his Pistol License because of similar innuendo; only to reinstate it on May 13, 1985. However, Respondents rescinded this reinstatement because of "your alleged association with gang members, as reported in the New York Daily News." It was only though judicial intervention that Petitioner's Pistol License was restored on that occasion.

Petitioner contended that Respondents utilized the Atlantic City incident, heretofore enumerated, as a pretext to again revoke

Petitioner's Pistol License solely because he had been depicted as having connections to Chinese organized crime, as a result of his Chinese national origin.

The fact remained that other than the one arrest heretofore mentioned and upon which Respondents improperly relied, Petitioner had never been arrested or convicted of any criminal offense.

With this background in mind, Petitioner alleged that, but for his national origin and his New Jersey arrest, Respondents would not have taken the action against him.

As a result, Petitioner claimed that his rights, under the Constitutions of the United States and the State of New York and other statute, were violated. Petitioner alleged that this was the case, since the actions of the Respondents served no legitimate public objective sought to be achieved, but were instead designed for purposes other than that required for the regulation of Pistol License holders, to wit: to invidiously discriminate against him based upon his national origin and upon an arrest for which he was acquitted.

Along these lines, Petitioner further alleged that the complained of actions of the Respondents, in revoking his Pistol License, were not a legitimate exercise of police power or any other legitimate public purpose and have no real substantial rational relationship to any legitimate end, including the control and regulation of Pistol Permits.

All of this, claimed Petitioner, rose to a violation of his rights to due process and to equal protection of the laws under the State and Federal Constitutions.

Petitioner also asserted that Respondents had violated his rights under New York State Executive Law and 42 U.S.C. Section 1983.

D. The Relevant Decree

The Appellate Division of the Supreme Court of the State of New York, on June 13, 1995, dismissed Petitioner's 42 U.S.C. 1983 claim against the individual Respondents by holding that they "should be granted qualified immunity from [Petitioner's] civil rights claims." After reviewing applicable standards, the Appellate Division, First Department held:

> "There can be no question in the instant case that the revocation of pistol permits on the impermissible basis of national origin would be a violation of a right clearly established with sufficient specificity such that a reasonable government official would have known that engaging in such conduct was unlawful. However, we find that a reasonable official could have believed that the conduct at issue here was lawful."

However, the Appellate Division, First Department then continued:

> "Absent a discriminatory motive, Respondents' challenged conduct would not violate clearly established law. However, Petitioner's pleadings with regard to discriminatory intent are vague and conclusory, and even in opposition to the motion to dismiss Petitioner fails to demonstrate any nexus between the specific evidence purportedly supporting the complaint and the acts of the Respondents (citation omitted.)"

The Appellate Division's conclusion was contrary to that of Justice Solomon, a Justice of the Supreme Court of the State of New York, who, upon trial court review, had held, on March 15, 1994:

> "As to [Respondents'] assertion that the individual Respondents are shielded by the doctrine of qualified

> immunity, the relevant inquiry in determining whether such a defense is available is whether the law violated was 'clearly established.' (citation omitted.)
>
> In the case at bar, it is apparent that the individual [Respondents] may not claim qualified immunity of the Federal claim. A reasonable person, utilizing an objective standard, would be expected to realize that one cannot discrimination in the fashion (nationality) alleged in the complaint."

Justice Solomon rejected Respondents' assertion that there was no violation of any "clearly established right."

In order to rectify the conflicting holdings of the State trial court and the intermediate Appellate court, Petitioner petitioned the State of New York Court of Appeals to review the matter in order to reconcile the conflicting determinations of the lower State courts. In an Order dated November 30, 1995, the State of New York Court of Appeals, the highest court of the State of New York, denied Petitioner's Motion for leave to appeal. This Order was the final decree in which a decision could be had by the courts of the State of New York.

In accordance with Rule 14(h) of the Rules of the Supreme Court of the United States, it should be noted that the federal question sought to be reviewed herein was addressed in the court of first instance, which was the Supreme Court of the State of New York. It was addressed by the Supreme Court of the State of New York in the decision of Justice Solomon which is part of the Appendix hereto. The same issue was then timely and properly raised on appeal to the Appellate Division of the Supreme Court of the State of New York and the State of New York Court of Appeals. These courts rendered a conclusion on the federal question raised herein which was in conflict with the conclusion reached by the Supreme Court of the State of New York.

ARGUMENT

The following discussion will reveal that this Petition should be granted because a state court of last resort has decided a federal question or an important question of federal law in a way that conflicts with applicable decisions of this Court.

> 1. The decree of the courts of the State of New York which determined that, with respect to Petitioner's federal claims, the individual respondents were shielded by the doctrine of qualified immunity, was inconsistent with applicable decisions of this Court.

The relevant inquiry, in determining whether an immunity defense is available, is whether the federal law violated was clearly established, not whether a reasonable person would have known the law. Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action."); Harlow v. Fitzgerald, 457 U.S. 800 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.") Salahuddin v. Coughlin, 781 F. 2d 24, 27 (2d Cir. 1986) ("Officials are held to have constructive knowledge of established law.").

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court, citing prior decisions, noted "we have held that qualified immunity would be defeated if an official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [Petitioner], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury ..." id at 815.

In other words, this court in Harlow held that qualified immunity applies if the conduct of a government official "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." id at 818. However, the court also cautioned:

> "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." Id at 819.

After reviewing this applicable case law, the New York courts should have clearly found that the individual Respondents could not be shielded by the doctrine of qualified immunity. Indeed, the court's Decision and Order appeared to support this proposition when it held that "the revocation of pistol permits on the impermissible basis of national origin would be a violation of a right clearly established with sufficient specificity such that a reasonable government official would have known that engaging in such conduct was unlawful." Since this is exactly what Petitioner is claiming herein and exactly what Respondents asserted was not the case, this is all that should have been required to conform with the previous holdings of this Court. Therefore, this conclusion of the State courts should have been the end of their consideration of the issue.

Instead, as we have seen, the State courts went beyond this and applied a standard which is not required by this Court's precedence. The determination of the State courts with reference to the qualified immunity issue, was clearly in conflict with the principles of quali-

fied immunity as set forth by this Court. The State courts should not have dismissed Petitioner's action based upon the existence of qualified immunity.

CONCLUSION

For the foregoing reasons, Petitioner respectfullyrequests that this Court grant this petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PART 23

PRESENT: Hon. Jane S. Solomon, Justice.

Index Number 113244/93 Motion Date 11/19/94
Motion Seq. No. 001 Trial Cal. No. 165

HERBERT LIU,

Plaintiff,

-against-

NEW YORK CITY POLICE DEPARTMENT,
LEONARD KAPLAN and ROBERT PLUTZKER,

Defendants.

The following papers numbered 1 to 6 read on this motion to dismiss the complaint.

	PAPERS NUMBERED
Notice of Motion to Show Cause - Affidavits - Exhibits, Mem. of Law	1-3A
Answering Affidavits - Exhibits	4, 5
Replying Affidavits	6

Upon the foregoing papers it is ordered that this motion is denied in accordance with the annexed memorandum decision.

Dated 3/15/94 J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 23

..... x

HERBERT LIU,

Plaintiff,

- against -

INDEX NO.
113244/93

NEW YORK CITY POLICE DEPARTMENT,
LEONARD KAPLAN and ROBERT PLUTZKER,

Defendants.

..... x

JUSTICE JANE S. SOLOMON,

Defendants seek an order dismissing the complaint pursuant to CPLR 3211 (a) (5) [collateral estoppel, res judicata, statute of limitations], (a) (7) [failure to state a cause of action], and (a) (8) [lack of service].

Complaining former licensee (hereinafter "Licensee") was legally licensed by the New York City Police Department (hereinafter the "NYPD") to possess two firearms within this state. Thereafter, these licenses were suspended by the NYPD for Licensee's failure to safeguard his firearms and their unauthorized transportation into a foreign jurisdiction (New Jersey). Licensee's initial application for Article 78 review of those suspensions was dismissed by this court (Judge S. Crane) for Licensee's failure to exhaust administrative remedies.

An administrative hearing to determine the status of Licensee's licenses was, thereafter, timely conducted before the NYPD Licensing Division. Upon finding Licensee's testimony neither credible nor persuasive, the hearing officer revoked Licensee's licenses because of circumstances which "cast great doubt upon licensee's character and fitness to possess a pistol license." Upon appeal, a final determination was rendered by the Commanding Officer of the NYPD Licensing Division affirming the Hearing Officer's revocation of Licensee's licenses.

Licensee then recommenced an Article 78 proceeding before this court seeking a judgment "reviewing, annulling and rescinding" NYPD's suspension(s) and "compelling [NYPD] to reinstate Petitioner's licenses and further compelling [NYPD] to return to petition [sic] his licensed firearms which it previously confiscated from Petitioner...". This court (J. Crane) denied the relief requested and confirmed the NYPD's determination, finding that "it was not irrational for [the NYPD] to reject on credibility ground..." (Liu v. NYCPD, Index No. 02315/91, Slip op. at 4 [Sup. Ct. N.Y.Co., Oct. 24, 1991], [rearg. denied], aff'd. 188 AD2d 284 [1st Dept. 1992], mot. for lv to appeal denied, 81 NY2d 708 [1993]).

Less than two months after the Court of Appeals denied Licensee leave to appeal, Licensee commenced this action claiming that his statutory and constitutional rights have been wrongfully infringed because the defendants (the NYPD, the hearing officer, and commanding officer of the NYPD Licensing Division) conspired to revoke his licensees without cause and as a pretext to discriminate on the basis of nationality. Licensee seeks compensatory and punitive damages, as well as the restoration of his firearms licenses.

The instant pre-answer dismissal motion ensued.

The first ground relied upon by defendants in seeking to dismiss this action is the doctrine of collateral estoppel. Defendants contend that the issues raised and determined in the prior Article 78 proceed-

ing now collaterally estop Licensee from maintaining this action.

The doctrine of collateral estoppel or issue preclusion, a narrower species of res judicata, establishes that material facts or questions which were in issue in a former action and judicially determined, are conclusively settled by a judgment there, and may not be litigated in a subsequent action D'Arata v. N.Y. Central Mut. Fire Ins. Co., 76 NY2d 659 (1990); Kaufman v. Eli Lilly & Co., 65 NY2d 449 (1985).

Seen as a means of reducing litigation and conserving the resources of the courts and the litigants (Kaufman, supra at 455), the doctrine is also designed to "reduce the number of inconsistent results which are always a blemish on a judicial system" Schwartz v. Pulbic Administrator of the City of the Bronx, 24 NY2d 65 (1969).

However, in order for the doctrine of collateral estoppel to apply, two requirements must be satisfied: "that an issue in the present proceeding be identical to that necessarily decided in the prior proceeding; that the party against whom enforcement is sought was accorded a full opportunity to contest the issue" Allied Chemical v. Niagara Mohawk Power Corp., 72 NY2d 271, 276 (1988); Boorman v. Deutsch, 152 AD2d 48 (1st Dep't 1989), appeal dismissed, 76 N.Y. 2s 889 (1990).

As to the identity of issue element, "the issue must have been material to the prior action and essential to the decision therein, and it must be the point actually to be determined in the subsequent action..." Keeler v. West Mountain Corp., 105 AD2d (3d Dep't 1984). The burden of establishing this element rests upon the party claiming the benefits of collateral estoppel. Ryan v. N.Y. Telephone Co., 62 NY2d 494 (1984).

The issue in the prior Article 78 proceeding as set forth in paragraph 33 of Licensee's Verified Petition is:

"Petitioner avers that the actions and determination

> of Respondent ... have been arbitrary, capricious and not supported by the facts and circumstances..."

There was no reference in Licensee's Article 78 proceeding to alleged statutory and/or constitutional violations or that defendants' actions were in any way related to Licensee's national origin. These issues are the crux of the within plenary action.

Issues such as equal protection, due process and discrimination were not raised in the prior proceeding and are not identical to the narrower issue which formed the basis of the prior proceeding. Furthermore, a review of the Article 78 decision (and appeals) renders it impossible to conclude that a resolution of the substantive issues now raised by Licensee were necessary to reach the decision to dismiss the Art. 78 petition See, Gramatan Home Investors Corp. v. Lopez, 46 NY2d 481 (1979); Fay v. South Colonie Central School Dist., 802 F.2d 21 (2d Cir. 1986).

Defendants next argue that this action should be dismissed on the ground of res judicata, or claim preclusion.

Under New York's "transactional approach" to res judicata, if claims arise of our the same "factual grouping" they are deemed to be part of the same cause of action, and the later claim will be barred without regard to whether it is based upon different legal theories or seeks different and/or additional relief. Smith v. Russel Sage College, 54 NY2d 185 (1981), rearg. denied 55 NY2d 878 (1982); O'Brien v. City of Syracuse, 54 NY2d 353 (1982). However, this approach is subject to certain limitations, one of which is that it will not be applied if the initial forum did not have the power to award the full measure of relief sought in the later litigation, Fay, supra at 29-30; McLean v. Cowen & Co., 48 NY2d 696 (1978); Davidson v. Capuano, 792 F.2d 275.

Where "formal barriers" to asserting a claim existed in the first forum it would be "unfair to preclude [the plaintiff] from a second

action in which he can present those phases of the claim which he was disabled from presenting in the first" (Davidson, supra at 278). In order for damages to be awarded in an Article 78 proceeding, the damages must be "incidental to the primary relief sought", and the relief must be "such as [the petitioner could have recovered] on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or her official capacity" (CPLR 7806). While "New York courts have not fully articulated a comprehensive test for determining" when damages are "incidental to the primary relief sought" in an Article 78 proceeding, substantial New York authority does indicate that damages for civil rights and constitutional violations are not incidental to the primary relief sought in an Article 78 proceeding. Davidson, supra at 278; Fay, supra at 30; see also Schwab v. Bowen, 41 NY2d 907 (1977); Leisner v. Bahou, 97 AD2 860 (3d Dep't 1983), appeal dismissed 62 NY2d 940 (1977); Rosario v. Blum, 80 AD2d 511 (1st Dep't 1981). For this reason, res judicata cannot apply to Licensee's instant claim.

Moreover, as here, an Article 78 petitioner often needs immediate relief. To that end, the damage limitation of CPLR 7806 protects an Article 78 court from the burden of deciding numerous issues in a civil rights damage claim, such as - the presence or absence of state action, immunity of state actors, and the possible existence of a municipal custom or policy. Thus, a construction of CPLR 7806 that prevents an Article 78 court from awarding civil rights damages furthers the expeditious nature of such a proceeding.

As to defendants' assertion that the individual defendants are shielded by the doctrine of qualified immunity, the relevant inquiry in determining whether such a defense is available is whether the law violated was "clearly established." Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Salahuddin v. Coughlin, 781 F2d 24 (2d Cir. 1986).

In the case at bar, it is apparent that the individual defendants may not claim qualified immunity on the Federal claims. A reason-

able person, utilizing an objective standard, would be expected to realize that one cannot discriminate in the fashion (nationality) alleged in the complaint.

Moreover, contrary to defendants' position, plaintiff's action is governed by the three year statute of limitations provided by CPLR 214 (5) rather than four month limitations period provided for Article 78 proceedings. Okure v. Owens, 816 F.2d 45 (2d Cir. 1987). Accordingly, plaintiff's action was commenced timely in May 1993, within three years of the date of the suspension of plaintiff's license to possess firearms.

As to defendants' remaining contentions (lack of service, and failure to serve a notice of claim), this court finds them to be without basis in fact and/or law. In particular, plaintiff submits uncontroverted proof of service on Robert Plutzker, the only defendant on whose behalf there is suggestion of an issue contesting personal jurisdiction. Also, the notice of claim requirements provided under General Municipal Law section 50-(e) are inapplicable to this action based on alleged civil rights violations. Lawless v. The City of Buffalo, 578 N.Y.S.2d 27 (4th Dep't 1991).

Finally, the complaint states a cause of action under the CPLR's liberal pleading requirements. See, McKinney's Consol. Laws of N.Y., Book 7B, CPLR 3201-3400, C3211:24 at 38. ("If from the four corners of the pleading, regardless of its form and draftsmanship, the factual allegations can be discerned which, taken together, manifest any claim cognizable at law, the pleading does state a cause of action and the motion [to dismiss] will fail.")

In view of the foregoing, defendants' instant pre-answer dismissal motion is denied in its entirety.

This constitutes the decision and order of the court.

DATED: March 15, 1994 ----------

J.S.C.

Murphy, P.J., Sullivan, Rubin, Ash, Williams, JJ.

54939 HERBERT LIU,

Plaintiff-Respondent A.E. Wolin,

- against -

New York City Police Department,
et al.,

Defendants-Appellants. M. Newman

Order, Supreme Court, New York County (Jane Solomon, J.), entered on or about March 28, 1994, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, the motion granted and the complaint dismissed, without costs.

Contrary to defendants' claim, actions against the municipality to recover for Federal and State civil rights violations are not subject to the notice of claim requirements in General Municipal Law §50-i (Felder v. Casey, 487 US 131; Alaimo v. New York City Dept. of Sanitation, 203 AD2d 501).

However, plaintiff's failure to specifically plead the existence of an official policy or custom which deprived him of a constitutional right in violation of 42 USC § 1983 is fatal to his claim against the municipality (Jackson v. Police Dept., 192 AD2d 641, 642, lv denied 82 NY2d 658, cert denied 114 S Ct. 1370). A municipality can be found liable under 42 USC § 1983 for deprivation of constitutional rights only where the municipality itself causes the constitutional violation at issue (id.). It cannot be held liable pursuant to 42

USC § 1983 based solely upon the doctrine of respondent superior or vicarious liability (id.).

Res judicata does not bar plaintiff from litigating his State and Federal civil rights claims in which he alleges that the revocation of his pistol licenses was discriminatorily based upon his Chinese national origin and deprived him of his constitutional rights. Although these claims were not raised in the prior article 78 proceeding challenging the revocations (Matter of Liu v. New York City Police Dept., 188 AD2d 284, lv denied 81 NY2d 708), damages for civil rights violations are not "incidental to the primary relief sought" (CPLR 7806; Davidson v. Capuano, 792 F2d 275), and thus, the article 78 court "did not have the power to award the full measure of relief sought" (id., at 278; see also, Fav v. South Colonie Cent. School Dist., 802 F2d 21, 29; Matter of Rosario v. Blum, 80 AD2d 511, 512-513). Nor is plaintiff collaterally estopped since the civil rights claims in the present action were not raised or necessarily decided in the prior action (see, D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664).

However, we find that the individual defendants should be granted qualified immunity from plaintiff's civil rights claims. A government official performing a discretionary function is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known (Anderson v. Creighton, 483 US 635, 639-40). Determination as to whether the doctrine of qualified immunity may be invoked requires a three-part analysis (Ying Jing Gan v. City of New York, 996 F2d 522, 532 [2d Cir. 1993]; Jermosen v. Smith, 945 F2d 547, 550 cert denied 503 US 962 [2d Cir. 1991]; Francis v. Coughlin, 891 F2d 43, 46 [2d Cir. 1989] [citing Anderson, supra]) The court must determine: 1) the identification of the specific right allegedly violated; 2) whether that right was so "clearly established" as to alert a responsible official to its constitutional parameters; and 3) whether a reasonable official could have believed that the particular conduct at issue was lawful.

Once the defense is raised by defendant, plaintiff has the burden to show that the constitutional right at issue was clearly established at the time of defendant's actions (Connor v. Foster, 833 FSupp 727, 730). A defendant-government official will prevail if the right asserted by plaintiff was not "clearly established" or if the official reasonably believed that his particular conduct was lawful. Qualified immunity is an affirmative defense and an issue of law which the court should decide at the earliest possible stage of the litigation, and it may be raised and decided on a motion to dismiss prior to discovery (Harlow v. Fitzgerald, 457 US 800, 815; Castro v. United States, 34 F3d 106, 112-13 [2d Cir. 1994]).

Where the objective reasonableness of an official's conduct rests on establishing whether defendant acted with an impermissible motive or intent, plaintiff must plead such intent with specific evidence (Lewis v. City of Ft. Collins, 903 F2d 752, 758 [10th Cir. 1990] citing Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F2d 642, 649 [10th Cir. 1988]; Hobson v. Wilson, 737 F2d 1, 29-31 cert denied 470 US 1084 [DC Cir. 1984]; Gooden v. Howard County, 954 F2d 960, 969-70 [4th Cir. 1992]; Ostrer v. Aronwald, 567 F2d 551, 553 [2d Cir. 1977]; Contemporary Mission, Inc. v. United States Postal Service, 648 F2d 97, 106-07 [2d Cir. 1981]).

There can be no question in the instant case that the revocation of pistol permits on the impermissible basis of national origin would be a violation of a right clearly established with sufficient specificity such that a reasonable government official would have known that engaging in such conduct was unlawful. However, we find that a reasonable official could have believed that the conduct at issue here was lawful.

A firearm licensing authority has broad discretion in rendering its determinations (Matter of Eddv v. Kirk, 195 AD2d 1009 affd 83 NY2d 919; Matter of Anderson v. Mogavero, 116 AD2d 885), and under the circumstances here where plaintiff engaged in conduct illegal on its face with regard to firearms, was arrested, and offered

an explanation for his conduct which could reasonably be viewed as lacking credibility, defendants had no reason to believe that their conduct was unlawful in revoking plaintiff's permits; indeed we found it rationally based (Matter of LIU, supra). Absent a discriminatory motive, defendants' challenged conduct would not violate clearly established law. However, plaintiff's pleadings with regard to discriminatory intent are vague and conclusory, and even in opposition to the motion to dismiss plaintiff fails to demonstrate any nexus between the specific evidence purportedly supporting the complaint and the acts of the defendants (Ostrer, supra at 553).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT.

ENTERED: JUNE 13, 1995

Catherine O'Haqau Wolfe, Clerk

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 14, 1995

Present -- Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
Israel Rubin
Sidney H. Asch
Milton L. Williams, Justices

Herbert Liu,

Plaintiff-Respondent,

-against-

New York City Police Department, et al.,
Defendants-Appellants.

M-3427
Index No.
113244/93

Plaintiff-respondent having moved for leave to appeal to the Court of Appeals from the decision and order of this Court entered on June 13, 1995 (Appeal No. 54939),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same is denied.

ENTER:

Catherine O'Haqau Wolfe, Clerk

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, Held at Court of Appeals Hall in the City of Albany on the Thirty day of November 1995

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

1-13 Mo. No. 1320

Herbert Liu,

Appellant,

v.

New York City Police Department, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION November 30, 1995

1-13 Mo. No. 1320 Motion for leave to appeal denied.

Herbert Liu,

Appellant,

v.

New York City Police Department, et al.,

Respondents.